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# A World Elsewhere: Secession, Subsidiarity, and Self-Determination as European Values

Timothy W. Waters

*Indiana University Maurer School of Law*, [tiwaters@indiana.edu](mailto:tiwaters@indiana.edu)

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# A WORLD ELSEWHERE: SECESSION, SUBSIDIARITY, AND SELF-DETERMINATION AS EUROPEAN VALUES

**Timothy William Waters**

Professor of Law and Associate Director of the Center for Constitutional  
Democracy, Indiana University Maurer School of Law

BRUTUS

There's no more to be said, but he is banish'd  
As enemy to the people and his country.  
It shall be so.

ALL PLEBEIANS

It shall be so, it shall be so.

CORIOLANUS

You common cry of curs, whose breath I hate  
As reek o' th' rotten fens, whose loves I prize  
As the dead carcasses of unburied men  
That do corrupt my air – I banish you!

...

... Despising,

For you, the city, thus I turn my back;  
There is a world elsewhere.

– *Coriolanus*, III.iii, 124-30, 140-2

There is a deep-seated, deeply felt if not necessarily deeply reasoned line of opposition to the very idea of secession. The division of a state is seen as the abandonment of shared commitments and values, a

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This paper is based in part on a lecture entitled 'People Live in Places: Secession, Subsidiarity, and the Assumptions behind Rigid Borders,' which I gave at the *Institut d'Estudis Autonòmics*, Barcelona, 18 June 2015. My thanks to Dr. Carles Viver and Mercè Corretja Torrens for the invitation to give that lecture and to write this essay, as well as to members of the audience that day for their valuable comments, and to Prof. Susanna Mancini, Christiana Mauro, and an anonymous reviewer for truly helpful suggestions and critiques.

retrograde step – failure and worse than failure. Here, for example, is J.H.H. Weiler, one of the most prominent scholars of international and European law, criticizing Catalan secession as an offense against the European Union and European values:

It is simply ethically demoralizing to see the likes of Catalonia reverting to an early 20th-century post-World War I mentality, when the notion that a single state could encompass more than one nationality seemed impossible. ...diametrically contrary to the historical ethos of European integration... The very demand for independence from Spain, an independence from the need to work out political, social, cultural and economic differences within the Spanish polity, independence from the need to work through and transcend history, disqualifies morally and politically Catalonia and the likes as future Member States of the European Union... In seeking separation, Catalonia would be betraying the very ideals of solidarity and human integration for which Europe stands.<sup>1</sup>

Now, this strikes me as profoundly misguided – exhibiting hostility, even animus against secession – and if only because of the prominence of the individuals who say such things, that animus, if not *merits*, then at least *warrants* a reply. This is especially true because, although I have quoted the comments of one scholar, he is by no means the only one singing from this harsh text: In less colourful form, it is the same view one can hear in Brussels and in various capitals; certainly, the core political consequence of this view – that secession is beyond the European pale and rightly removes the seceding community from the Union – is common and nearly canonical.<sup>2</sup>

It is also mistaken. In this essay, I want to show two things: first, that secession is in fact fully consistent with European values – and specifically the values of the European Union; and second, that we

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1. Joseph Weiler, "Catalonia's Independence and the European Union," *EJIL Talk!*, 20 Dec. 2012, <http://www.ejiltalk.org/catalonian-independence-and-the-european-union/>.

2. EU Commission President Manuel Barroso voiced his opposition to secession, for example. But certainly this view is not universal: Many prominent scholars support the idea of secession as a viable possibility, and see no contradiction with being European, as debates on fora like *Verfassungsblog*, or indeed the comments to Weiler's original post suggest. Yet even those favourable to the idea acknowledge the weight of the consensus: "Of course the default legal position seems to be that, upon independence, the EU Treaties simply no longer apply..." Piet Eeckhout, "Scotland and the EU: Comment by Piet Eeckhout," *Verfassungsblog*, 9 September 2014, <http://verfassungsblog.de/en/scotland-eu-comment-piet-eeckhout/>. I use Weiler's text as a convenient point of focus because it is so prominent and so strongly argued, but I think anyone familiar with the debate knows that skepticism about the merits or propriety of secession is widespread, is indeed the politically dominant view.

have – or could have – a means for realizing those values in international law and politics generally.

My point is general, not applicable only to Catalonia – it is, in fact, part of the larger project I am working on to define and defend a right of secession. Whether or not that model, in its full detail, would specifically benefit the minority of Catalans now attempting to secede from Spain is an open question – but in its general outlines, the idea certainly does provide support for the sort of thing they believe it is their right to attempt. It suggests that Catalans and others who wish to pursue a separate political destiny ought to be able to try, and succeed or fail, as Europeans and *within* Europe. Given the level of opposition they face both legally and politically, not only within Spain but within the broader European Union and the global community concerned with international law, that is no small thing.

## 1.

...with all our devotion to our role an uneasy feeling grows in us that we have travelled past our goal or got on the wrong track. Then one day the violent need is there: Get off the train! Jump clear! A homesickness, a point before the thrown switch put us on the wrong track. And in the good old days when the Austrian Empire still existed, one could in such a case get off the train of time, get on an ordinary train on an ordinary railroad, and travel back to one's home.

There, in Kakania, that state since vanished that no one understood. ... All in all, how many amazing things might be said about this vanished Kakania!.

– *The Man without Qualities*<sup>3</sup>

Before we turn to that first question in full, let us look more carefully at the professor's comments. I don't think 'animus' too harsh a term – it reflects the vitriol with which he advances his argument: the full text refers to a "frenzy for secession and independence", associates Catalan independence with the "mindset" of the "poisonous logic of national purity and ethnic cleansing", and calls secession "irredentist Euro-tribalism which contradicts the deep val-

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3. Robert Musil, *The Man without Qualities*, Sophie Wilkins, trans., Vintage International, 1996, pp. 28-9.

ues and needs of the Union.”<sup>4</sup> Nor does this concern only Catalonia – in a later post, Weiler uses nearly identical language to criticize the Scottish independence movement – rather it is a general critique of secession in Europe.<sup>5</sup>

Of course, that might just be describing reality – after all, we have words like ‘frenzy,’ ‘poisonous’ and ‘tribalism’ for a reason. Each reader, and each observer of things in Catalonia (or Scotland), will have to decide for himself. Surely there are some Catalan secessionists who exhibit such negative attitudes, who traffic in questionable grievances and slanted histories, but that tells us little. There are such people everywhere, just as everywhere one finds people given to categorically dismissing those whose ideas they disagree with in the worst possible terms, people standing by with a bucket of tar, or perhaps of blood.

But if we restrict ourselves to more formal, analytical claims, we can see several themes:

- Catalan secession is somehow a reversion to a mentality associated with the interwar period, and in particular with the idea that a multi-national state is impossible.
- This mentality contradicts the idea of European integration, and indeed of human integration more generally.
- There is an obligation to work within the existing Spanish polity, and to transcend history, which the Catalan secession movement is failing to fulfil.

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4. Weiler, “Catalonia’s Independence and the European Union.” The reference to ethnic cleansing is immediately qualified, though in a way that reinforces the association: “I am not suggesting for one minute that anyone in Catalonia is an ethnic cleanser. But I am suggesting that the ‘go it alone’ mentality is associated with that kind of mindset.” Id.

5. Prior to the Scottish referendum, Weiler took “a similarly dim view of the Scotland case [as of Catalonia,]” and using often verbatim language, spoke of a “frenzy for secession and independence in Europe” premised on an assumption that new states will find a safe haven in Europe, and repeats his arguments about “that poisonous logic of national purity and ethnic cleansing” and the “mindset” of ethnic cleansing, and saying that the debate in Scotland “runs diametrically contrary to the historical ethos of European integration.” The view is somewhat more moderate, however, accepting that Scotland could seamlessly join the Union as an independent state: “I do not think a real interregnum would be necessary. The would-be independent Scotland could negotiate her accession in her current status, go through all the European constitutional hoops save the final signature of the Act of Accession. That can be planned to take place, literally on the very same day that Scotland becomes formally an independent State.” Weiler, “Scotland and the EU: A Comment.”

- The failure to meet those obligations makes Catalonia unfit for European Union membership, which suggests clear criteria an independent Catalonia would fail to meet.
- Finally, all of this is an ethical matter, a question of European values – “rooted in the Christian ethic of forgiveness”<sup>6</sup> – and not only for Catalonia, but for other communities like it.

These are quite serious claims, if also – as with most questions of values – hard to pin down with precision. But they are no less serious for that – those obligations to transcend history, for example may not be clearly explicated, but that does not mean they do not matter.

First, what exactly is this reversion? To assign something to the interwar period is, inevitably, to colour it with suspicions of degradation, decline and decadence; it might be heady – flappers, the Jazz Age, the Berlin of *Cabaret* – but it is going to end badly. Of course, the people living then did not call it the interwar period; they called it the post-war period, or something like that, because they lived in their own time, not in ours, which they called the future. They were feeling their way, muddling through – a great principle of Europe before the Great War and still today.

The new, notionally mono-national states of Central and Eastern Europe succeeded to the great antebellum empires (which of course did not know they were antebellum any more than their successors knew they were interwar). I myself feel a considerable nostalgia for the Austro-Hungarian Empire, and have often thought that, whatever its faults, it was in many respects a great deal better than what came after; but I am not sure it is a model for how we wish to live today. And it is certainly not the model for how we do: whatever one thinks of them, the states formed out of the cataclysm of the Great War – with further, brutal modifications after the Second – are in fact part of the matrix and the map of the present European Union, whereas the great multinational empires are not. Precisely because of their history – some as products of the interwar era, others of the earlier state-building phase in Western Europe – the states of the European Union rank among the most ethnically homogenous states in the world, as

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6. Joseph Weiler, “Catalonia’s Independence and the European Union.” The identical language appears in Joseph H.H. Weiler, “Scotland and the EU: A Comment,” *Verfassungsblog*, 8 September 2014, <http://verfassungsblog.de/en/scotland-eu-comment-joseph-h-h-weiler/>.

close as we get to nation-states in the technical sense.<sup>7</sup> So it cannot be the actual existing states and their 'mononationalism,' but rather the 'mentality' that is the problem: that problematic mentality is clearly the idea of secession itself – the creation of new states.

How then does making new states contradict the idea of European integration, or human integration more generally? The European Union has 28 members, and although its translation services suffer exponentially heavier workloads whenever new languages get added, the precise number of members (so long as it is two or more) is absolutely irrelevant to the Union's conceptual framework. If anything, the tremendous growth in the Union's membership suggests that having *more* members is part of the project. If there is any actor contemplating shrinking the Union, it is those in the Commission and various capitals who insist that a secessionist region must be expelled; certainly the secessionists in Catalonia and Scotland are not looking to get out.

Nor is there any absolute direction or valence to the European Union as an *integrative* project; as British objections show, the goal of 'ever greater union' may be in the treaty, but is not in fact a universally shared value. (Let us pause to reflect on the irony that secessionist Scots are more likely to support the European Union than are English supporters of British union). And whatever level of integration we contemplate, it is between *x* number of states joined in a common union through a treaty: Nothing in the project requires a direct merger of two or more sovereigns, and nothing – except for politics, of course – would prevent one sovereign from becoming two and still integrating in the Union.<sup>8</sup>

As for human integration, in the last hundred years the number of states has increased roughly four-fold, as the great imperial and

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7. See Max Fisher, "A Revealing Map of the World's Most and Least Ethnically Diverse Countries," *Washington Post* (May 16, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/05/16/a-revealing-map-of-the-worlds-most-and-least-ethnically-diverse-countries/> (showing the most ethnically homogenous countries clustered in Europe, with sub-Saharan African states generally exhibiting the greatest ethnic diversity). Of course, the mere incident of relatively greater homogeneity says nothing about attitudes or policies. All the major Catalan separatist parties advocate a civic nationalism that includes Spanish speakers, for example.

8. Secession would contradict integration in only one particular circumstance: the actual merger of all European Union members into a single sovereign. There is no evidence, however, that that is a formal goal, and if it were proposed, it would be vigorously opposed by many otherwise committed members of the present Union.

colonial empires collapsed.<sup>9</sup> Just since the end of the Cold War, more than 20 new states have been created, several of which have joined the European Union. (For someone arguing that we need a right of secession, as I do, this is an awkward fact, since we seem to be creating new states on the same amount of land all the time). It may be that creating more states violates some principle of human integration, but it hardly contradicts actual human practice.

Talking about the interwar period inevitably makes one think of Nazis; presumably this is the endpoint of the ethnic cleansing mindset we are to associate with secession. The problem of course – apart from the general problem that equating one's opponents with Hitler usually signals the end of useful argument – is that the Nazis actually were European integrators par excellence. Not, to be sure, according to the same values that animate the European Union, but it just goes to show that integration is not necessarily good, nor is it the only human value we should care about.

Coloratura aside, there is a troubling teleology in insisting that secession is retrograde – something wrong with co-locating present events in the past. Saying something is backwards implies something else is forwards, and we rarely need look farther than the speaker to figure out what that something else might be. Surely the truth – a truth Europeans who remember the 20<sup>th</sup> century should appreciate better than anyone else – is that there is no Direction to History, that it is lower-case through and through. Such progress narratives are problematic, since if secession is salient today – and clearly it is – we could just as well claim that the interwar period was prefiguring the present (which, if anything, is a more defensible formulation). Better just to say it is a bad idea, at that time, this, or any, if that is what one feels.

But we cannot escape the past so easily, it seems: There is also 'the need to work out political, social, cultural and economic differences within the Spanish polity, and 'the need to work through and transcend history.' What are these obligations to the Spanish state, and to history?

It is true that the Catalan National Assembly has been proceeding with a secessionist program – aiming to prepare for independence in

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9. See "Member States: Growth in United Nations membership, 1945-present," *United Nations*, <http://www.un.org/en/members/growth.shtml> (not showing the many states created in the interwar period).



18 months – <sup>10</sup> that brings it into conflict with Spain's constitution and government; secession clearly violates numerous constitutional provisions on the sovereignty and territorial integrity of Spain.<sup>11</sup> And they are doing so despite not ever having actually secured a clear majority vote on a clear question about independence:<sup>12</sup> the current program is based on a mandate secured in parliamentary elections, in which the secessionist parties pledged to pursue a common independence platform – but those parties have considerable differences on economic, social and other policies, and were also elected to govern the existing region within Spain, so that mandate is ambiguous. Rule of law *is* one of the values of the Union,<sup>13</sup> and we all ought to be troubled by a too-casual disregard for the prevailing constitutional and legal order.

At the same time, we should also be troubled by any obligation that prefigures all possible outcomes. There is effectively no scope within the Spanish polity for the idea that Catalans might ever work out their differences with Spain by exiting. State authorities have

10. Ashifa Kassam, "Catalonia MPs vote for secession as Spain looks to block plans in court," *The Guardian*, 9 November 2015, <http://www.theguardian.com/world/2015/nov/09/catalonia-mps-to-vote-on-secession-plan-in-showdown-with-spains-government> (noting that the legislation contemplates creation of a tax authority and social security system, and that the National Assembly will not be bound by review by or decisions of Spanish authorities).

11. Const. Spain (1978, rev. 2011), Sec. 1.2 ("National sovereignty belongs to the Spanish people, from whom all state powers emanate."); Sec. 2 ("The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards"); Sec. 8.1 ("The mission of the Armed Forces... is to... to defend [Spain's] territorial integrity and the constitutional order."); Sec. 19 ("Spaniards have the right to freely choose their place of residence, and to freely move about within the national territory."); Sec. 139 ("No authority may adopt measures which directly or indirectly hinder freedom of movement and settlement of persons and free movement of goods throughout the Spanish territory."); Sec. 153 (identifying the Constitutional Court and Government as exercising "[c]ontrol over the bodies of the Self-governing Communities"). Many other provisions are relevant to the entirely uncontroversial view that Catalonia's unilateral secession would violate Spain's constitution. For example, Secs. 143-158 regulate the autonomous communities and define their competences, which clearly do not include any power to declare independence, and specify numerous competences reserved to the Spanish state.

12. This is the standard in *Reference re Secession of Quebec* [1998] 2 S.C.R. 217, at ¶ 100, as the "initial impetus" for negotiations on secession.

13. Consolidated Version of the Treaty on European Union Art. 2, 2010 O.J. C 83/01 ("The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.") The argument I advance here is focused principally on democracy and rule of law, but other values – freedom, human dignity, human rights and minority rights are equally relevant.

constitutional authority to prevent secession;<sup>14</sup> the only possible path would require the agreement of the *Cortes Generales*,<sup>15</sup> but that is universally understood to be out of the question. If we say, 'you must work within the Spanish order,' the result is pre-determined: There will not, cannot be secession.

I think it is a conundrum. It is important – it is one of those values Weiler would expound, and I agree – to remain within the bounds of law, to be ruled by law; and this, clearly, the Catalan separatists have now begun to move beyond. Yet given the resistance of the Spanish state, the National Assembly's declaration is a logical step, and logically there must come a point at which the bounds of law no longer constrain, because the propriety and rightness of that constraining authority is the very thing at issue. One cannot insist that a majority of Catalans must answer a clear question, but then prohibit the asking of it – yet this is what the Spanish state has done.

In the ideal case, there would be only one thing that we would allow to be decided outside the purview of the state: the decision to secede itself, with a clear majority answering a clear question. That, by its nature, is a question that is not and cannot be subject to the constitutional order, because it aims to reconstitute that order.<sup>16</sup> But all else – choices about how to govern, rather than if to – should, ideally, be taken within the existing order, or in the new order only after the decision to secede is taken. So it is of great concern that the Catalan separatists have begun doing many things that are matters of governance, and

14. Const. Spain (1978, rev. 2011), Sec. 155 ("If a Self-governing Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government, after having lodged a complaint with the President of the Self-governing Community and failed to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take all measures necessary to compel the Community to meet said obligations, or to protect the abovementioned general interest"). The government has already taken measures to assert control over financial matters in response to the National Assembly's secessionist program. See Tobias Buck, "Catalan leaders angry at Madrid's tightened financial control," *Financial Times*, 24 November 2015, <http://www.ft.com/intl/cms/s/0/f0868ab8-92bc-11e5-bd82-c1fb87bef7af.html#axzz3sTlStnor>.

15. Const. Spain (1978, rev. 2011), Sec. 90 (providing for the regulation of referenda, and giving the Senate power to veto a referendum text); and Sec. 92 ("Political decisions of special importance may be submitted to all citizens in a *consultative* referendum." [emphasis added]).

16. It *can* be, in the sense that a constitution can allow for secession, as the United Kingdom does. But a constitutional order cannot properly or completely provide for unilateral secession in violation of its own order, and as a matter of international law, a constitution that actually prohibits secession cannot in fact fully regulate or exclude the question.

not the decision itself. At the same time, this choice is understandable, because it is not sensible to declare independence when one has not built even the minimum apparatus to govern. The preparations that Catalonia is undertaking are the sorts of things any state needs to have in its control – which is precisely why Spain is resisting them.

The better model is what Scotland did: to take the decision on one question only, and if for secession, then build the institutions and negotiate before finally declaring independence. But the essential element in that case, which is missing here, was the acquiescence of the sovereign state. That is what made it possible for Scots to deliberate, confident in the knowledge that if they chose to secede, there would be time to negotiate the transfer of powers, and from a position of considerable strength. The Spanish state has not accommodated the separatists in any way; the state's recalcitrance has placed them in the difficult position of having to put their cart before their horse.

In thinking about this, we should recall the logic of the *Quebec Reference*, which considers the conditions under which a unilateral secession might merit recognition by other states. It is, the *Quebec* court tells us, a matter of good faith: if the seceding entity fails to negotiate in good faith, other states might not accord it recognition.<sup>17</sup> But equally, if the state itself does not in good faith take the secessionists' concerns and complaints seriously, the case for other states to recognize a seceding entity is stronger – and similarly, the fact of secessionists' starting to build the institutions of governance before they have decisively broken away may be more legitimate if the state has not provided them meaningful scope for peaceful deliberation on the ultimate question.

In any event, nothing in international law prohibits secession,<sup>18</sup> and indeed nothing in the European Union's legal order clearly does

17. Reference re Secession of Quebec [1998] 2 S.C.R. 217, at ¶ 143 ("an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition.").

18. In international law, secession is conceived of as a political question. See, e.g., Marcelo Kohén (ed.) *Secession: International Law Perspectives* (Cambridge University Press, New York, 2006); Susanna Mancini, "Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination," 6 *Int'l J. of Con. L.* 553 (2008). At the least, declarations of independence are not contrary to international law. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 ¶ (July 22), available at <http://www.icj.org>

so.<sup>19</sup> As a matter of Spanish law, it is not possible, but as a matter of European law – and values – it is probably a matter of indifference. If this were not the case, how should we understand the recent events in Scotland – more precisely, London’s recent acquiescence in those events? We would have to consider them as yet another example of the United Kingdom’s peculiarly distant relationship with the European Union; yet not once in the debates over Scotland’s referendum did anyone suggest that allowing a vote on secession was some insular opt-out from an otherwise mandatory European norm.<sup>20</sup>

Missing from the focus on the need to work within the Spanish context is any sense that Spain too might have some ethical obligation to take Catalan secessionists seriously and work with them. Anyone

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[www.icj-cij.org/docket/files/141/15987.pdf](http://www.icj-cij.org/docket/files/141/15987.pdf). (“State practice during this period [concerning Kosovo] points clearly to the conclusion that international law contained no prohibition of declarations of independence.”).

19. The Lisbon Treaty does provide that the Union shall respect member states’ role in protecting their own territorial integrity:

The Union shall respect... [Member States’] national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security...

Consolidated Version of the Treaty on European Union Art. 4(2), 2010 O.J. C 83/01. Thus Spain could plausibly argue that the other Union members have an obligation not to recognize the new state, perhaps also invoking the “sincere cooperation” principle of mutual assistance in Id. Art. 4(3) Id. However, this does not actually oblige the Union to take any position on a *completed* secession. Spain chooses to prohibit secession, but if secession nonetheless occurred, then, following the *Quebec* court’s logic of effectivity, it is not clear the Union or its members would be prohibited from dealing with the new state. Certainly, in international law, the norms for recognition of new states are so flexible, so subject to auto-interpretation, that it is not tenable to declare, *ex ante*, that a factually independent Catalonia could not and would not be recognized; the moment would make the rule.

In any event, the official position in Brussels – for all the robust opposition to secession – is actually quite nuanced. See “European Commission did not authorize any official answer regarding Catalonia’s independence,” *Catalan News Agency*, 23 September 2015, <http://www.catalannewsagency.com/politics/item/european-comission-didn-t-authorise-any-official-answer-regarding-catalonia-s-independence> (discussing an apparent mistranslation of European Commission President Juncker’s comment, in the official English, that “It is not for the Commission to express a position on questions of internal organization related to the constitutional arrangements of a particular Member State[,]” which in the curiously longer Spanish version included the comment that “The determination of the territory of a Member State is established by its National Constitution and not by an autonomous parliament’s decision contrary to that Constitution”).

20. See Timothy William Waters, “For Freedom Alone: Secession after the Scottish Referendum,” *Nationalities Papers* (2015), DOI: 10.1080/00905992.2015.1101434; <http://dx.doi.org/10.1080/00905992.2015.1101434>.

familiar with the course of events there over the last ten years knows that, whatever one's views, the Spanish government and constitutional court have been extraordinarily resistant to taking secessionist sentiment seriously; it is an opinion almost universally shared that, had the Spanish government shown any accommodation of the Catalans *on this question as such*, the whole matter would never have reached the critical mass that it did around 2012 and continuing to this day. Instead, official Spain has doggedly resisted, such that Catalans can argue – plausibly, whether or not correctly – that there is no longer any point pursuing their interests within the existing order.

The 'need to work through and transcend history' strikes me as a stirring phrase that utterly fails to explain what one ought to do in any given moment of what, in time, will turn out to be history too. One might as well say that Catalans are transcending history by challenging the Spanish state, and indeed – with the central role that the supposed injustice of whatever exactly happened in 1713 plays in Catalan nationalist thought – <sup>21</sup> that is exactly what they think they are doing.

Evidently working through and transcending history means accepting without question the political units history has bequeathed us, even though anyone with the most rudimentary understanding of negotiations theory would instantly grasp that treating the existing units as defaults will radically shape the outcomes one might work towards or transcend; in short, assuming the Spanish state radically narrows the set of possible outcomes. To say Catalans must transcend history within the Spanish state is simply to prefer Spanish nationalism to Catalan nationalism, and we should have reasons – other than merely historical ones – for doing this. Yet the argument is only scrutinized on one side, because here we find one of those ratchets that so often operate in claims about what is right and what is possible when we think about states.

It is expressly this failure to deal with the Spanish state and with history that 'disqualifies Catalonia and the likes morally and politically as future Member States of the European Union.' Yet it is difficult to

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21. See, e.g., Simon Harris, "The Siege of Barcelona," *Catalonia is Not Spain: A Historical Perspective*, 10 August 2014, <http://independence.barcelonas.com/siege-barcelona/#sthash.WGJnOUg9.dpbs> (discussing the siege and subsequent dismantling of autonomous Catalan institutions, and arguing that by the end of 1714, "it is fair to say that Catalonia ceased to exist and that a new entity called Spain was created based on military subjugation and political, economic, and linguistic repression). Catalan NATIONALISM exhibits strong tendencies towards historical legalism – basing its legitimacy on claims about historical rights, although of course linguistic difference plays a significant role as well.

point to something particular in the *acquis communautaire* in defence of this proposition. As a technical matter, it is probably true that Catalonia (or Scotland, or any seceding region) would have to apply for membership – although in fact the Union treaties are not clear on this point, and it is surely possible to imagine defensible theories under international law in which more than one part of a dividing state could succeed to its treaty obligations.<sup>22</sup>

But quite apart from the technical question, it is hard to see why division of a current member is so destructive of the Union's values, when divisions that closely preceded membership were not. The Czech Republic and Slovakia chose to defy the logic of human integration and refused to work through their own histories just over a decade before they joined the European Union, as did the Baltic states, Slovenia and, later, Croatia; Cyprus was admitted immediately *after* its Greek majority rejected a plan to solve its *ongoing* secession crisis. Why did this not disqualify them morally and politically? From the point of view of the state, it hardly matters whether secession happens before or after accession. So it is hard to see the difference for the Union either, unless the moment of membership is another one

22. The Lisbon Treaty describes procedures for European states to apply for membership, for member states to withdraw from the Union, and for states to rejoin, but says nothing about the secession of a section of a member state, let alone a section wishing to remain in the Union. Consolidated Version of the Treaty on European Union Art. 49-50, 2010 O.J. C 83/01. So, is there any way to consider a secessionist state as a continuing member? New states presumptively succeed to the original state's obligations under humanitarian treaties; is it plausible to describe the European Union treaty architecture, at least in part, as being a humanitarian treaty? I think it's a stretch, but the European Union has adopted increasingly clear human rights obligations, and the Union's own most fervent advocates certainly conceive of it in moral and ethical terms. Moreover, when a state dissolves or divides, some of the new units can be considered continuator states, in which case they take on all general legal obligations of the original state, and it is by no means fixed in law which units those are. Almost everyone assumed that, had Scotland seceded, the rest of the United Kingdom would have continued as a member of the European Union – after all, it has most of the original state's territory and population and its capital – but there is no clear formula for determining the identity of the continuator state: Russia was declared the continuator of the Soviet Union, but Serbia was not declared the continuator of Yugoslavia, despite having a roughly equal share of population, in neither case a majority of the original state's population. It is even possible for the majority of a country to secede, but how should that be handled? Like so many things in international law – and especially things concerning the identity and counting of units – there is terminal uncertainty, and that counsels for a generous view of a seceding state's possibilities. I discuss the idea of majority secession in Timothy William Waters, "The Blessing of Departure: Acceptable and Unacceptable State Support for Demographic Transformation: The Lieberman Plan to Exchange Populated Territories in Cisjordan," 2 *Law & Ethics of Human Rights* 221 (2008), available at <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1020&context=facpub>.

of those great ratchets that locks peoples into a whirring machine of ever-more-cosmopolitan integration.<sup>23</sup>

And as a matter of substantive law, there is almost surely no objection. Catalonia already is part of the European Union through Spain's membership, and if there were features of Catalonian society or governance that made it unfit, they would likely make Spain unfit today. I realize I risk a tautology of my own, but here it is: If Spain, Catalonia too; and if not Catalonia, not Spain either. It cannot be some technical matter of the *acquis* – at most, a few chapters might need to be addressed (regarding institutions that only a sovereign state deals with, and which therefore Catalonia still needs to develop<sup>24</sup>) – so instead it must be a matter of these defective values, the very attempt to secede, that renders Catalonia unfit. We have just seen how the circle of that argument closes to an infinitesimal absurdity.

But as to the last claim, that this is a matter of ethics and values, which ought to apply to all such cases generally: I think we can all agree on that.

A Klee painting named *Angelus Novus* shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. The storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.

– *Theses on the Philosophy of History*<sup>25</sup>

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23. One suspects there is one circumstance in which it might be okay *not* to accept the state that history has given us: when transcending history might yield more integration into Europe.

24. Weiler acknowledges this in regard to Scotland, and it is difficult to see why it should be different for Catalonia – except for the bare political question of Spain's agreement, but then that is the very thing itself: "there should be no legal impediment for Scotland to become a Member State if she satisfies the condition for Membership, political and legal, one of which is a unanimous decision of all Member States. On the technical side it should be a relatively easy accession, since the European legal *acquis* is part of the political and legal fabric of Scotland." Weiler, "Scotland and the EU: A Comment."

25. Walter Benjamin, *Illuminations (Theses on the Philosophy of History)* at 257-8 (Harry Zohn, trans., New York: Harcourt Brace Jovanovich, 1968).



## 2.

So let us now consider the matter more generally – more synthetically. As mentioned, I wish to show two things: first, that secession is consistent with European values; and second, that we have the means available in law and politics to give those values expression.

The first claim:<sup>26</sup> secession is a form of subsidiarity. Subsidiarity is a principle concerned with finding the right level for decision-making and public authority. It arises out of Catholic teaching, but its most robust articulation has been in the European Union, as a way to distribute authority between the Union, member states, and regions.<sup>27</sup> Subsidiarity is a central principle of Union governance,<sup>28</sup> so if secession can be understood as a kind of subsidiarity, it will be fully consistent with the European Union's legal order and, presumably, European values.

Subsidiarity is typically thought of as giving preference towards decision-making at lower levels, and in the European Union subsidiarity is expressly defined in this way and includes formal decisional criteria.<sup>29</sup> But in fact it has no inherent directionality, and can just as easily lead to upward integration, to centralization of authority, if that is the right level to get things done.<sup>30</sup> Of course, to speak of the 'right' level is a fiction: Subsidiarity does not actually decide what the right

26. This section draws upon concepts I develop at length in Timothy William Waters, "Shifting States: Secession and Self-Determination as Subsidiarity," *Percorsi costituzionali* 751 (3/2014), but the language here is new.

27. See Philipp Kiiver, *The Early Warning System for the Principle of Subsidiarity: Constitutional theory and empirical reality* (New York: Routledge, 2012); Didier Fouarge, *Poverty and Subsidiarity in Europe: Minimum Protection from an Economic Perspective* 15-24 (Northampton, MA: Edward Elgar, 2004) (surveying philosophical and historical origins of subsidiarity); Antonio Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford: Oxford University Press, 2002); Renaud Dehousse, "Does Subsidiarity Really Matter?," *EUI Working Paper LAW No. 92/32* (European University Institute, 1993), at 2-9 (discussing origins of EU subsidiarity through 1992).

28. Consolidated Version of the Treaty on European Union Art. 5(1) and (3), 2010 O.J. C 83/01.

29. Andreas Føllesdal, "Subsidiarity and the Global Order," *PluriCourts Research Paper No. 13-04*, at 1, *forthcoming in Subsidiarity in Comparative Perspective* (Augusto Zimmermann & Michelle Evans, eds., Springer 2014), <http://ssrn.com/abstract=2359963> ("the burden of argument lies with attempts to centralize authority").

30. Examples of this logic may be seen in recent calls for 'more Europe' in response to the demonstrable failure of the Schengen regime of open internal borders to cope with large migration flows – common policy at the European level, more powers for Frontex, and the like. But the alternative – dismantling Schengen and returning to more robust



level for any function is, and does not even tell us how to decide.<sup>31</sup> The exercise of subsidiarity sounds like a technical matter, but in fact, like most decisions, it is political in nature: it is about choosing to assign authority to different social, economic, political or historical units.

You might assume secession is *not* an exercise in subsidiarity: After all, secession breaks a community, rather than redistributing decision-making within it. But in fact, secession *is* a redistribution of power between levels within the system we call the international legal order. Secession means escape from one state, but not from the state system – it repositions one community, formerly with the powers of a region or sub-unit (if that), at the level to which we assign the powers of a state. Whatever rights and obligations a state has, that unit now has, and has them in relation to other units.<sup>32</sup> In our case, this means the relationship between Spain and Catalonia would be redefined, not as one of state to region, but state to state – and this would be true for the relationship between Catalonia and other states too. In this sense, independence is not just the *devolution* of power so much as the *elevation* of one community's status in relation to the other parts within the system as a whole. Seen in this way, secession is entirely consistent with the logic of subsidiarity.

This becomes even clearer if we consider the question in relation to regional organizations, such as the European Union. Unlike the international legal order, it is possible to escape the European Union entirely – indeed, those who oppose Catalonia's secession threaten that it would be expelled if it seceded. But this is a discretionary choice – a matter of policy and treaty design – and, as mentioned earlier, it would be entirely possible to imagine a different rule, according to which areas presently part of a member state would presumptively remain members under the same treaty regime. There is nothing inherent in secession that requires a unit to withdraw from a regional organization like the European Union.

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border controls – is likewise a decision about the proper level at which to make decisions: both can be characterized as exercises in subsidiarity.

31. See, e.g., Gareth Davies, "Subsidiarity as a Method of Policy Centralisation," in *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Tomer Broude & Yuval Shany, eds.; Portland, OR: Hart, 2008) at 79 (arguing that subsidiarity does not act as a useful principle for resolving disputes between governance levels).

32. This is particularly clear if we consider that norms of customary international law automatically apply to new states – new states are immediately embedded in a pre-existing international legal architecture.

Instead, secession reconfigures the political units within a regional organization, but without necessarily changing the broader system's substantive norms or the units' relationship to the system. For example, the European Convention on Human Rights applies to Spain, and thus to Catalonia. Were Catalonia to become independent, the convention's substantive provisions would apply, *mutatis mutandis*, to the new state – because the ECHR is a humanitarian treaty – and its citizens would have the same rights they now have as Spanish citizens; their rights would not be affected in any way by a change in the units, other than having a different institutional pathway to Strasbourg through Barcelona rather than Madrid. This same logic would apply – or could apply – to relations between Catalonia and the European Union: Most of the Union's substantive rules regulating social and economic activity are the same for all members and could apply to Catalonia if it became (or remained) a member. The addition of a Catalanian state would require adjustment to the Union treaties, but it would not significantly alter the law governing the Union.

What secession *does* change is the status of the sub-state region in relation to the other units and to the regional body.<sup>33</sup> An independent Catalonia would have the same types of obligations and rights that units like Spain – that is, states – have, so obviously Spain's relationship to Catalonia would be different, and so would other countries'. But this change is readily understandable as an exercise in subsidiarity: the assignment of certain powers of decision-making to one level rather than another. Conceptually, secession would read as a decision that the state-level functions within the EU system would best be exercised, for that region, by the region itself, now designated a state; it would be seen as an "attempt at redrawing the internal boundaries of the EU, rather than as a move away from the Union."<sup>34</sup> Subsidiarity is about finding the right level to govern people on territory; so is secession.

Catalonia would be a 29<sup>th</sup> unit, but nothing in its independence would actually distinguish it from the other 28 – indeed, when one

33. It is worth recalling that secession would require changes in the treaties even if Catalonia were expelled. Voting rights are distributed by population, and Spain's would decline. Provision would have to be made concerning the application of European Union programs on Catalan territory, and the rights of Catalans living in other member states. There is no way to avoid changes to the treaties except to reject secession altogether who would be stripped of the European Union citizenship.

34. Nico Krisch, "Catalonia's Independence: A Reply to Joseph Weiler," *EJIL Talk!*, 18 January 2013, <http://www.ejiltalk.org/catalonias-independence-a-reply-to-joseph-weiler/> (referring to Weiler's article as a "polemic" and "heavily misguided in substance").

puts it this way, it is hard to see how adding one more member to a club that already has 28 is a shocking departure from that club's values. Whatever one's preferred reading of the treaty texts, the 'expulsion' of an independent Catalonia is not required by the logic of the Union – certainly not one identified with both 'ever greater union' and 'being united in diversity.'

### 3.

Secession may be an act of subsidiarity, but as we have seen, subsidiarity does not tell us *how* to decide any question; neither, therefore does it tell us *why* we should accept, let alone prefer,<sup>35</sup> an independent Catalonia. Why exactly should Catalonia be a state, as opposed to some other unit: Spain itself, or Catalonia plus the Balearics, or Catalonia minus Barcelona? Subsidiarity doesn't actually provide a decisional mechanism – it simply exhorts us to select the right level, without telling us what that level is. Even if we frame the problem as one of democracy, we face a conflict between two democratic claims – that of the Catalan community and the Spanish community. There are really two questions here: *why* a seceding community ought to have priority, and *how* to identify that community.

Fortunately, we have another mechanism – another language – that can provide us with a robust answer to these questions. Self-determination – at least in its earlier, pre-classical formulation, dating from that same troublesome interwar period – offers a legal and normative justification for assigning governance to lower levels: that the lower level ought to have certain functions *and* ought to make the decisive choice itself.

Self-determination is commonly thought to be related to ethnicity or national identity – certainly its Wilsonian incarnation as a political principle was seen in this way – but it is equally understandable as a democratic and territorial principle, recognizing that people live in places, and that those places matter in particular, politically relevant

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35. I do not prefer it – I am agnostic, preferring only those outcomes we can plausibly describe as expressing the legitimate will of a majority of some relevant political community. At no point has the Catalan secessionist movement yet provided a proof of this will, and even the recent parliamentary victory of the secessionist parties in the September 2015 elections did not bring a popular majority.

ways to those people more than to others.<sup>36</sup> Even under conditions of globalization, there is an irreducibly physical and territorial aspect to human political community, which at its heart is about governing people in relation to each other and to resources: Most people lead lives that are strongly centred in a particular set of places, and even the most cosmopolitan among us have centres of greater relevance to our personal, social, economic and political lives. Self-determination relates that fact to the value of giving autonomous choice to human beings living in close proximity to determine the political future of their shared places. This deference to people in the places they live provides a substantive basis for subsidiarity, yielding what the Jesuits might call a preferential option for the lower. As I have argued elsewhere:

Self-determination provides a normative basis for a community to claim a particular position in the distribution of authority at the international level. And the basis for this, consonant with democratic and human rights logic, is the assertion that individuals and their communities have inherent dignity or rights which law should not contradict, but support.<sup>37</sup>

Assuming, of course, we know what the lower level is and what it wants. One of the key objections to justifying secession through self-determination is that it is impossible satisfactorily to identify the self-determining unit. Here is a classic formulation of the objection, which identifies this problem in self-determination's origins at the beginning of the interwar period:

A Professor of Political Science, who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition, the doctrine of self-determination. On the surface, it seemed reasonable: let the people decide. It was in fact ridiculous, because the people cannot decide until someone decides who the people are.<sup>38</sup>

36. For a modern territorial interpretation, somewhat different in its premises but responsive to this logic, see Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," 16 *Yale J. Int'l L.* 177 (Winter 1991).

37. Waters, "Shifting States: Secession and Self-Determination as Subsidiarity" (and quoting Andreas L. Paulus, "Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?," in *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Tomer Broude & Yuval Shany, eds.; Portland, OR: Hart, 2008) at 193, arguing that self-determination provides some democratic legitimacy in the international legal order).

38. Ivor Jennings, *The Approach to Self-Government* 55-56 (1956).

More recently, Weiler advances the same argument, saying secession based on self-determination...

...begs the question of who is the 'political self' that has the right to determine whether or not the historical nation – even if composed of several peoples – will be broken up and secession allowed... There is no self-evident answer to this question.<sup>39</sup>

That is true enough, but it is far from clear it is a dispositive objection. In many cases, there is a plausible, even agreed means of determining *a priori* the identity of the political self, because a territorial unit already exists that is associated with an identifiable sub-group. This was the case for Quebec, for Scotland, for Kosovo, and now for Catalonia. When various actors can agree to consider an existing unit as relevant – as Canada and the United Kingdom did, and as many states (if not Serbia) have for Kosovo – the identity of the self-determining community can be assimilated to that unit.<sup>40</sup>

But even in places that do not have a pre-existing political boundary, there is no reason to believe the question is really so difficult to answer. Human communities constitute themselves in many ways – civil society forms in an almost organic manner, political parties can form quite quickly – and there is no reason why political communities should not also. This means, in practice, that a claim for self-determination can plausibly be generated by actors speaking on behalf of a community, and whose legitimacy comes from general recognition by the community itself of their claim to speak. We know this can work, because in many historical cases, territorial units have been created to accommodate existing “social and demographic reality”, which means that it was possible to approximate the contours of the

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39. Weiler, “Catalonia’s Independence and the European Union.”

40. This can actually work against separatists, since pro-independence sentiment may not be evenly spread across the territory. Thus English-speaking parts of Quebec and the Cree-populated north were generally not in favour of secession; in Scotland, the Orkneys and Shetlands generally opposed secession; and in Catalonia, independence sentiment is stronger in the north than in Barcelona. Indeed, a pre-existing territory may have been devised with precisely the idea in mind of diluting ethnic or national concentrations: arguably this was the purpose for the complex Soviet-drawn borders in the Fergana Valley of Central Asia, for example. And, of course, the existing unit may not contain all of the nation – as Catalonia does not, nor the Basque Country, nor Tibet – in which case secessionists face a political choice. In Catalonia, the choice has been to rely on the existing unit, rather than some amorphous claim to a linguistically defined territory.

community *before* any boundary defined it.<sup>41</sup> The best answer to the objection is an Alexandrian one that cuts the knot of proof: The self that determines, determines itself.

Besides, it is itself unsatisfying to say, simply because there is no self-evident answer to this question, that we therefore prefer absolutely whatever political communities happen to be lying about beneath the angel's wings in the detritus of history. Unsatisfactory both in its lack of rigor, and because such a solution – the apotheosis of the *status quo in se* – treats the existing demographic distribution of power as a moral given, and in fact creates unsatisfying conditions for large numbers of structural minorities (structural, that is, only in relation to the borders we happen to have).<sup>42</sup> Those conditions require their own justification.

The model of self-determination I have just described offers a pathway to justification, but this robust language is not the one we currently use.<sup>43</sup> Instead, the dominant interpretation of self-determina-

41. Reference re Secession of Quebec [1998] 2 S.C.R. 217, at ¶ 59 ("The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867."). To be sure, sometimes it is the unit that creates the demography – this is the logic of Anderson's 'imagined communities,' which form in response to the existence of bordered political territories that create bureaucratic and academic circuits between periphery and centre, share information sources, and succumb to the imaginative power of maps. Benedict Anderson, *Imagined Communities* (London: Verso, 1991). But of course the idea is much older: Its logic is embedded in Massimo d'Azeglio's lapidary utterance, "*L'Italia è fatta. Restano da fare gli italiani*" – "We have made Italy. Now we must make Italians." Nothing in this essay supposes that political communities, including national communities, are anything other than social constructions; the point is simply that sometimes the construction of the nation occurs before the formation of its territorial unit.

42. See Krisch, "Catalonia's Independence: A Reply to Joseph Weiler," on this point.

43. For discussions of the dominant model of self-determination and criticisms of it, see Christian Walter, Antje von Ungern-Sternberg, & Kavus Abushov (eds.) *Self-Determination and Secession in International Law* (Oxford: Oxford University Press, 2014); Daniel Thürer & Thomas Burri, *Self-Determination*, in Rüdiger Wolfrum, *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013); Jure Vidmar, "Remedial Secession in International Law: Theory and (Lack of) Practice," 6(1) *St Antony's Int'l Rev.* 37 (2010); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford: Oxford University Press, 2007); Marcelo Kohen (ed.), *Secession: International Law Perspectives* (Cambridge University Press, New York, 2006); Christopher Heath Wellman, *A Theory of Secession* (Cambridge: Cambridge University Press, 2005); Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (McGill – Queen's University Press 2002); Diane F. Orentlicher, "Separation Anxiety: International Responses to Separatist Claims," 23 *Yale J. Int'l L.* 1 (1998); Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: the Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1996); Martti Koskenniemi,

tion is Weilerian: fixated upon fixed borders as normatively desirable stabilizers, and therefore suspicious of, even hostile to, the idea of secession. It is an *idée fixe* – a foundation of our world order.

But what if it is wrong – as wrong in its assumptions and empirical claims as it is misguided in its normative thrust? What if, in fact, borders increase conflict and distort democratic processes? This is precisely the question my larger project aims to address – to test the assumptions that underlie and feed this animus against secession or border changes of almost any kind, and consider the possibilities for an alternative rule to manage peaceful change.

#### 4.

I cannot possibly describe the argument in full here, so I will just sketch its outlines: note some of the existing rule's contours and assumptions, then suggest an alternative and consider some of its advantages.<sup>44</sup>

The contemporary interpretation of self-determination – as a legal right (rather than merely political principle) founded in the United Nations Charter and central to the global order (see Appendix 1) – provides that peoples govern themselves, but defines 'peoples' as the populations of *existing* states or discrete, non-self-governing territories. There are very few of the latter left, so self-determination is no longer a generative norm for creating new units – the so-called external form of self-determination. The only means of creating new states are as a remedial response to extreme persecution or denial of participation in the larger society – a rare category that requires considerable harm before it can be invoked<sup>45</sup> – or in the event a state

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"National Self-Determination Today: Problems of Legal Theory and Practice," 43(2) *Int'l & Comp. L. Q.* 241 (1994); Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven, Connecticut: Yale University Press, 1978).

44. Parts of this section draw on arguments concerning the assumptions we make about and the problems with empirically measuring territorial integrity rules that I expound at length in Timothy William Waters, "Taking the Measure of Nations: Testing the Global Norm of Territorial Integrity," *Wisc. J. Int'l L.* (forthcoming).

45. This is the only circumstance Weiler would allow: "it is only under conditions of political and cultural veritable repression that a case for regional referenda can convincingly be made." Weiler, "Catalonia's Independence and the European Union." Remedial secession itself is a controversial doctrine. On remedial secession, see Jure Vidmar, "Remedial Secession in International Law: Theory and (Lack of) Practice," 6(1) *St Antony's Int'l Rev.* 37 (2010).



dissolves (as Yugoslavia did), in which case some internal candidates for statehood (such as federal units) necessarily have to be identified.<sup>46</sup>

In its internal form, self-determination continues to do generative work, promoting the internal democratization of existing states: each state's entire population enjoys the right of self-determination by taking part in their own governance, and increasingly this has come to mean specifically democratic governance. Here too, sub-groups within the larger population may be identified as holders of autonomy or federal units, but this is discretionary; in general, a minority's right to self-determination can be realized as an integral part of the whole population, within the borders of the existing state, and no state is obliged to realize it in any other way.<sup>47</sup>

The result is a system in which existing international frontiers are effectively fixed, and we assume this is a good thing. We assume it is stabilizing, that the alternative would produce uncontrollable fracture, as recalcitrant minorities would exit to form ever more, ever smaller, ever less liberal stateless that would descend into intractable violence. These assumptions prove quite difficult to confirm, however, since the same rule of territorial integrity obtains for the entire globe: it is quite difficult to know if present levels of violence, conflict, oppression of minorities and resistance to central state authorities are happening *despite* the current rule of fixed borders, or *because* of it.

All of these assumptions are quite vulnerable. The idea that states would endlessly fracture assumes every minority would eagerly seek to form its own state; this ignores the range of incentives to integrate – common security, economic advantage, shared identity and values – which would not disappear just because exit became possible.<sup>48</sup> Nor is it clear that more and smaller states are necessarily a problem: there is no clear correlation between the size of a state and its prosperity or stability, nor is there any reason to assume smaller states are

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46. See Steven Ratner, "Drawing a Better Line: Uti Possidetis and the Borders of New States," 90 *Am. J. Int'l L.* 590 (1996) (critically discussing the use of internal boundaries as international frontiers after state dissolution).

47. Indigenous peoples have a distinct right of self-determination that may require states to afford them high levels of autonomy, but indigenous self-determination expressly precludes any alteration to the territorial integrity of the state.

48. For example, there are still several small colonies that have chosen not to become independent because they value the economic and security benefits of belonging to a larger unit; and recently Scots voted to remain part of the United Kingdom, and with Scots on both sides of that question strongly favouring continued integration in the European Union.



necessarily more illiberal; indeed, many secessions have been attempts to escape larger illiberal or repressive regimes. Giving minorities the option of exit surely would encourage some to leave – presumably a good thing from their point of view, since evidently they wanted to – but others would use that option to negotiate a better deal for staying, much as the Quebecois and Scots have done.

As for the risk of instability and violence, it is far from clear what the contribution of fixed borders is: do they in fact reduce violence? International, cross-border wars have declined dramatically since the Second World War, but internal conflicts have greatly increased.<sup>49</sup> As I have argued elsewhere...

...even if the present rule has had an effect, it might not have reduced violence so much as redirected it from cross-border conflicts to internal conflicts. It is even possible – though just as hard to prove as the prevailing assumption – that the current rule has *increased* violence, by creating the conditions for groups locked inside the modern state to engage in all-or-nothing struggles for the control of states from which there is no effective exit.<sup>50</sup>

And when violence breaks out, is it because of the secession, or states' resistance to it? Kosovo's secession from Serbia was extraordinarily violent, and it is clear that the Kosovo Liberation Army purposely took up arms against the Serbian state, but that decision came after a decade of fruitless attempts to effect peaceful change in Kosovo's status using non-violent means, attempts that had met only with indifference and coercion from Serbia. When the KLA took up arms, the Serbian state reacted with dramatically escalated reprisals and ethnic cleansing. So, in which ledger ought we to mark that violence: as an example of the dangers of secession, or the dangers of a system that permits states to use almost any means to defend their territory against the people living on it?

One way to evaluate the effectiveness of the current normative regime is to imagine what an alternative might look like and might actually do. I suggest an alternative (see Appendix 2) that directly challenges some of the core assumptions we hold about territorial integrity. Its central premise: create a single exception to the rule of territorial integrity – a right for self-identified sub-groups in a state's population to make a claim to secede by organizing a plebiscite. The

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49. Lotta Themnér & Peter Wallensteen, "Armed Conflicts, 1946–2013," 51 *J. Peace Res.* 541, 544, Fig.1 (2014) (coding internal, international and other forms of conflict since 1946).

50. Waters, "Taking the Measure of Nations" (forthcoming)(emphasis original).

group would define the territory on which the plebiscite would occur, but sub-groups within *that* area could make counter-claims in a cascading process (much as was successfully done in plebiscites after the First World War). The plebiscitary territory might have to meet certain standards, such as a minimum population (either an absolute number or some percentage of the original state's population) and some contiguity of territory.

The right to secede would be a true right, not subject to proofs that the claimant group had suffered in any way – that is, not dependent on some threshold of harm to invoke a remedial right to secede – and not based on any historical claim to the territory. The claimant population would not need to have a coherent ethnic identity – it need not have any identity at all; it only requires that a majority (or supermajority<sup>51</sup>) of the population on that territory clearly express a desire to form a separate state. In this sense, it is a radical expression of territorial democracy; it solves both the uncomfortable problem with Wilsonian self-determination – that claimants need a coherent ethno-national identity – and the objection that there is no way to determine who the relevant political self is – because that is decided in an act of auto-interpretation vindicated through a democratic exercise.

The democratic quality of this changed rule is radical, but in other respects, the rule is quite conservative: no other norms of the international legal order need to be altered. The rule would encourage, even require significant changes in constitutional law in many states,

51. This would be bad news indeed for Catalan separatists, who historically have never secured even a majority of the popular vote, including in the 2015 election (in which they secured a majority of seats in the National Assembly). Still, there might be good reason to insist on a supermajority: Secession is undeniably disruptive of existing constitutional order, so it might make sense to assure ourselves that it is genuinely the choice of a significant majority in the relevant territory; many constitutional changes require a supermajority, and it seems reasonable to conceptualize secession as of at least the same order of significance. Moreover, the logic of a plebiscite whose territory is defined by the community itself presents certain moral hazards: an aggressive nationalist might claim much more territory than is in fact occupied by his nation, hoping to dominate all of it with a bare majority vote; requiring a supermajority would force such actors to self-regulate their claims to ensure victory. A supermajority makes independence harder, but not impossible; some secessionist groups – in Kosovo and South Sudan, for example – have been able to produce very high supermajorities for independence. But a supermajority is by no means necessary: the Quebec Reference only speaks of a *clear* majority, and the recent Scottish referendum was conducted on the understanding that a bare majority would be decisive. Even that is proving difficult in Catalonia, but if there is any justification for unilateral secession, in the absence of grave harms that require a remedy, it must be grounded in some claim about the will of the population in a given area – a local territorial majority. It is hard to see why a mere *parliamentary* majority – itself an artefact of the existing political order, which the secessionists reject – should suffice.

and the moment of secession would create an opportunity for international regulation: new states might be required to commit themselves to extensive human rights protections in exchange for recognition, for example (as happened with states in the former Yugoslavia). But the main purpose of the new rule – the real change it would create – would be to shift the balance in negotiations between the state's majority and sub-groups of the population: a right of exit would make it possible for sub-groups to negotiate a better deal for staying.

Such a rule would be undeniably more complex than the present rule, but then the problem we are seeking to regulate is itself complex. And in many circumstances, the new rule would be more just: communities that laid claim to new states or negotiated better deals for staying would clearly consider themselves better off. Creating new states also creates new minorities, but logically, these will be numerically smaller than the ones we have now; unless we assign an absolute priority to the existing state as the normative unit, there is no reason to *prefer* its continuation. And there is an intuitive normative sense in recognizing that the enforced marriage of self-identified communities is no more justified than the enforced marriage of individuals. Declaring that the people of the existing state – in this case, Spain – have an absolute priority simply reifies the existing state, which is the very thing a claim of secession contests.

There is one certain effect of such a rule: it would, in the short term, increase instability. Change is destabilizing. But *not* changing is dangerous too – it is only that its dangers are put off, compounded, expressing themselves only after a period of drift. Drift can be more dangerous than active engagement to manage a country's dissolution. Everyone knows the expression 'grab the bull by the horns,' but we rarely stop to think what it really means: grabbing a bull by the horns is extraordinarily dangerous, but you do it because the only thing more dangerous is *not* grabbing the bull by the horns; better now than later, because later may be too late. Unquestionably, there would be violence under this new, alternative rule – but there is violence under the existing rule, and the only relevant, moral question is whether there would be more violence or less. Besides, the benefits to stability could be significant: the present rule, in its rigidity, offers no option other than reinvesting in the existing state; a more flexible rule would give us broadened options for resolving conflicts in precisely those cases where options are most needed.

There is a tendency to view secession as a bad thing, as failure. But division is not a worst-case scenario; it is change. And it is fully consistent with European integration; if it can be achieved peacefully,

there is no principle, and no policy reason, that compels the European Union – which has long been vulnerable to charges of undemocratic elitism – to oppose it.<sup>52</sup> We should not be insisting upon the states we have simply because we have them – we should subject them, too, to searching scrutiny; we should expect not only the secessionist, but the state, to justify itself in what Renan rightly called “the daily plebiscite.”<sup>53</sup>

Se vogliamo che tutto rimanga com'è, bisogna che tutto cambi.

– *Il Gattopardo*<sup>54</sup>

So he drove out the man; and he placed at the east of the garden of Eden Cherubims, and a flaming sword which turned every way, to keep the way of the tree of life.

– *Genesis 3:24 (KJV)*

It will be said, in objection, that such a project is not simply dangerous – if indeed it is, if it is more so than what we now do – but worse than dangerous: it is idealistic. That charge has been levelled since Wilson's day – his own Secretary of State, Robert Lansing, expressed his scepticism in just such terms:

The more I think about 'self-determination' the more convinced I am of the danger of putting such an idea into the minds of certain races. It is bound to be the basis of impossible demands. This phrase is simply loaded with dynamite... [The] fixity of national boundaries and of national allegiance, and political stability would disappear if this principle was uniformly applied... [it is] the dream of an idealist.<sup>55</sup>

52. Nor is this only true in Catalonia. Here is a recent assessment of Bosnia: “[T]he right structure can make Bosnia work. But other outcomes are possible, and disintegration is not the worst. BiH might reform sufficiently to complete EU accession but split peacefully.” International Crisis Group, “Bosnia's Future,” *Crisis Group Europe Report* No. 232, 10 July 2014, at 42. I have advanced similar arguments about the value of democratic principles in thinking about secession in the Bosnian context. See Timothy William Waters, “Assuming Bosnia: Taking Politics Seriously in Ethnically Divided States,” in *Deconstructing the Reconstruction: Human Rights and the Rule of Law in Postwar Bosnia and Herzegovina* (Dina Francesca Haynes, ed., Ashgate, 2008).

53. Ernest Renan, “Qu'est-ce qu'une nation?” [What is a Nation?], lecture delivered at the Sorbonne, 11 March 1882 (referring to “un plébiscite de tous les jours”); English translation at [http://web.archive.org/web/20110827065548/http://www.cooper.edu/humanities/core/hss3/e\\_renan.html](http://web.archive.org/web/20110827065548/http://www.cooper.edu/humanities/core/hss3/e_renan.html).

54. Giuseppe Tomasi di Lampedusa, *Il Gattopardo* (1958); Giuseppe Tomasi di Lampedusa, *The Leopard* (Archibald Colquhoun, trans., Pantheon 2007) at 26 (“If we want things to stay as they are, things will have to change.”).

55. Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* 316 (1995)(citing Robert Lansing, *The Peace Negotiations – A Personal Narrative* 96 (1920)).

We have already seen – in the briefest sketch – why the kinds of assumptions animating Lansing’s doubts may not in fact be true. Certainly, if we look at the list of ‘certain races’ Lansing was worried about – the Irish, the Indians, the Egyptians, the Boers of South Africa, the ‘Mohammedans’ of Syria, Palestine, Morocco and Tripoli, the ‘Zionists’<sup>56</sup> – they are almost all part of independent countries today, and we tend to think it better that way, for all the trouble ‘they’ might give ‘us.’ One is even a member of the European Union – in two parts. Wilson’s dangerous idealism looks like the order of things; now, it is Lansing who looks like the one holding onto a fading, impossible ideal, and an imperial one at that – an ideal about things always staying as they are.

And is that not, in its way, the same ideal the opponents of secession expound today? In warning against going back to ‘an early 20<sup>th</sup>-century post-World War I mentality,’ they invoke the very period when Wilson proposed the new order that Lansing found so distressingly, dangerously idealistic. Who here is fetishizing the state – and the state of things as they are: the Catalans, or the Spanish? Which is the vision that now informs the European project, or should? Is it Wilson’s ideal, or Lansing’s?

When we reflect on what those most opposed to secession say our ideal ought to be, what do we see? With its posing of opposites and its categorical exclusions, its language of poison and betrayal, its scorn for those who cannot “stomach the discipline of loyalty and solidarity”,<sup>57</sup> its genuflection before a dead past as the shaping order for the future, its insistence on unity coupled to threats of expulsion, its high moral tone and its biting anathemas, their ideal almost sounds like the very thing they most despise.

So we should wonder: Is this truly the vision we wish for ourselves? Ever higher, all together, in the forms we inherit from the past – or be cast out! And how many will we cast out? That too is an ideal, yes, but a hard-edged one, a burning, purifying vision, rigid, austere and unyield-

56. Cassese, *Self-Determination of Peoples* 316 (citing Robert Lansing, *The Peace Negotiations – A Personal Narrative* 96 (1920): “What effect will it have on the Irish, the Indians, the Egyptians, and the nationalists among the Boers? Will it not breed discontent, disorder and rebellion? Will not the Mohammedans of Syria and Palestine and possibly of Morocco and Tripoli rely on it? How can it be harmonized with Zionism, to which the President is practically committed?”).

57. Weiler, “Catalonia’s Independence and the European Union,” (“an independent Catalonia predicated on such a regressive and outmoded nationalist ethos which apparently cannot stomach the discipline of loyalty and solidarity that one would expect it owed to its fellow citizens in Spain?”).

ing – not the Garden but its guardian. It is the logic, not of Christian forgiveness, but of banishment, and it lacks those qualities of tolerance and true brotherhood that surely are Europe's finest inheritance.

## **Appendix: Two Rules of Territorial Continuity and Change**<sup>58</sup>

### *1. The Current Rule – A System of Fixed Borders*

- The international system is structured around norms of territorial integrity. These norms are expressed as formal, legal rules, but also closely reflect political practice.
- Existing states may alter their own borders voluntarily – through cession of territory, merger, or secession.
  - In so doing they may have to take into account the interests of the affected population.
- But existing states have a nearly ironclad guarantee of their territorial integrity – their borders are protected against unwanted alteration, from without or within, in almost all circumstances.
- Self-determination gives the populations of existing territories a right to self-governance: non-self-governing territories can become independent, at which point they have the same protections as existing states.
- Increasingly, self-determination includes a right to internal democratic governance, but only for the totality of the existing unit.
- The only bases for creating a new state on the territory of an existing state against its will are:
  - remedial secession because of
    - gross violations of minorities' human rights; such as genocide, or
    - systematic and invidious exclusion of some group from participation in the whole territory's self-governance;
  - or: total dissolution of the state
    - but even then successor units will, if at all possible, be drawn from existing territorial sub-units, rather than newly identified peoples.
- Law and politics tend to analyse divisions of states as voluntary or the product of dissolution, rather than secession.

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58. These schemas appear, in similar form, in Waters, "Taking the Measure of Nations" (forthcoming).

- Groups as such have no right to form new states; the normative structure is markedly suspicious of ethnically based claims to create new states.

## *2. An Alternative Rule – A Right of Secession*

- The assumption of territorial integrity can be defeated by internal claims by a self-defined community constituting a local territorial majority.
- Such communities vindicate their claims exclusively through a series of internationally monitored or sanctioned plebiscites.
  - The self-defining community itself determines the plebiscitary territory, subject only to these limits:
    - . some minimum population,
    - . some minimum contiguity of the territory, and
    - . no claim that crosses an existing international frontier.
  - Other communities within the territory can make counter-claims, leading to a cascading plebiscite process.
- To claim for a new state, a community must win a clear majority (or super-majority) among all those living in, or having long-standing ties to, the plebiscitary territory.
  - Historical claims are given no weight, apart from recent acts of violent displacement.
- In addition to winning its plebiscite, a secessionist community must:
  - accept all residents of the territory as full citizens of the new state.
  - undertake to respect all relevant human rights provisions, and
  - subject itself to ongoing international supervision.
- The mother state would be under an obligation to:
  - allow and facilitate the plebiscite, and
  - negotiate in good faith the seceding community's departure, in the event the plebiscite succeeds.
- The right is iterative with respect to any territory or population.
- All other commitments within the international state system (human rights, non-aggression, succession rules, etc.) are unaffected.



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## ABSTRACT

There is a strong animus against the idea of secession, which is seen as violating the integrative values of the European Union. This animus is misguided, which this essay demonstrates in two ways: first, that secession should be understood as an act of subsidiarity, and as such is fully consistent with European values; and second, that we have the means for realizing those values in international law and politics generally by using the language of self-determination – though not the contemporary doctrine, rather a radically democratic form: a right to secession. Beginning with a critique of a prominent attack on Catalan secession, this essay shows the problematic conceptual and moral underpinnings of the animus against secession; it then demonstrates the ethical and legal relationship between subsidiarity and secession, the usefulness of self-determination as a justificatory framework, the advantages of a radical right to secession, and the moral case for embracing secession as a European value.

**Keywords:** Secession; Subsidiarity; Self-Determination; European Union; Spain; Catalonia; Independence; Nationalism; Integration; EU Law; International Law.

## RESUM

Existeix una forta animositat envers el concepte de 'secessió', que en general es veu com una violació dels valors d'integració defensats per la Unió Europea. Aquest sentiment és un error, com pretén demostrar aquest assaig. I ho fa de dues maneres: en primer lloc, defensant que la secessió s'ha d'entendre com un acte de subsidiarietat, i que com a tal, és plenament coherent amb els valors europeus; en segon lloc, perquè disposem dels mitjans per a la realització d'aquests valors en el dret i en la política internacional a través de l'anomenat 'dret a l'autodeterminació' – tot i que no en la variant derivada de la doctrina contemporània, sinó més aviat en una forma diferent i radicalment democràtica: el dret a la secessió. A partir de la crítica d'un dels notoris atacs de què ha estat objecte el procés de secessió català, l'assaig assenyala primer els errors conceptuals i morals en què es basa l'animadversió vers la secessió; tot seguit, demostra la relació ètica i legal entre la subsidiarietat i la secessió, la utilitat de l'autodeterminació com a marc de justificació, i els avantatges del dret radical a la secessió. Per acabar, referma que la secessió és en la seva integritat, i de ple dret, un valor europeu.

**Paraules clau:** secessió; subsidiarietat; autodeterminació; Unió Europea; Espanya; Catalunya; independència; nacionalisme; integració; dret de la UE; dret internacional.

## RESUMEN

Existe una fuerte animosidad contra el concepto de 'secesión', que, en general, es visto como una violación de los valores de integración defendidos por la Unión Europea. Ese sentimiento está equivocado, y este ensayo pretende demostrarlo de dos maneras distintas: en primer lugar, porque la secesión debe entenderse como un acto de subsidiariedad, y como tal, es plenamente coherente con los valores europeos; en segundo lugar, porque disponemos de los medios para la realización de esos valores en el derecho y en la política internacional mediante el llamado 'derecho a la autodeterminación'- aunque no en la variante derivada de la doctrina contemporánea, sino más bien en una forma diferente y radicalmente democrática: el derecho a la secesión. A partir de la crítica de uno de los notables ataques de los que ha sido objeto el proceso de secesión catalán, el ensayo señala primero los errores conceptuales y morales en los que se basa la animadversión contra la secesión; a continuación, demuestra la relación ética y legal entre la subsidiariedad y la secesión, la utilidad de la autodeterminación como marco de justificación, y las ventajas de un derecho radical a la secesión. Por último, defiende que la secesión es en su integridad, y de pleno derecho, un valor europeo.

**Palabras clave:** secesión; subsidiariedad; autodeterminación; Unión Europea; España; Cataluña; independencia; nacionalismo; integración; derecho de la UE; derecho internacional.